

Subject: Hylebos NRD Settlement Proposal

Date: Tue, 18 Jun 2002 14:06:31 -0700

From: "Gregory A. Jacoby" <GAJ@mcgavick.com>

To: <gail.e.siani@noaa.gov>


Dear Ms. Siani:


Attached are the comments of Modutech Marine, Inc. for the Trustees' NRD settlement proposal. A cover letter and hard copy have been mailed to your attention. My apologies for these being one day late.

Very truly yours,

Gregory A. Jacoby

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 Gregory A. Jacoby.vcf	Name: Gregory A. Jacoby.vcf Type: Plain Text (text/plain) Encoding: 7bit
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MODUTECH MARINE, INC.
June 17, 2002
Comments Regarding
Natural Resource Damage Settlement Proposal Report
(Public Review Draft: March 14, 2002)

A. General Comments.

1. Modutech Marine would like to resolve its natural resource liability but finds the Trustees' settlement proposal to be very difficult to understand and respond to.
2. The Trustees have spent several years developing the data to support their settlement proposal. A ninety-day comment period is simply not enough time to adequately assess and comment upon such a detailed and complicated settlement proposal.
3. The Trustees claim to have identified significant evidence of natural resource injury based on their admittedly incomplete natural resource damage assessment for Commencement Bay. The settlement proposal provides some information regarding the damage assessment but primarily focuses on the conversion of damages to discounted service acre years (DSAYs) using the habitat equivalency analysis (HEA).

The Trustees assert that 2,438 DSAYs are required to compensate for natural resource damages. If each DSAY is conservatively estimated to cost \$10,000, the value of the alleged damages exceeds \$24 million. The settlement proposal contains virtually no information with which a PRP can evaluate the underlying basis for the Trustees' \$24 million damage claim. A partial list of issues that warrant further discussion and/or explanation include:

- the Trustees' assumptions regarding baseline natural resource conditions;
 - the Trustees' method for determining chronic and acute effects;
 - the level of uncertainty associated with the damage assessment; and
 - whether bioassay data generated by the Hylebos Cleanup Committee have been factored into the damage assessment.
4. The settlement proposal assumes that sediment remediation in the Hylebos Waterway will be complete in 2003. (Proposal at 13). This assumption may prove to be optimistic. How will the settlement proposal be affected, if the sediment remediation is not completed in 2003?
 5. The settlement proposal acknowledges that the Trustees have not attempted to apportion liability among multiple parties at a single site or facility. (Proposal at 17). For those PRPs associated with a multiple party site, it is impossible to

evaluate the fairness of the settlement without knowing how the Trustees view the intra-parcel allocation.

6. The Trustees' allocation is based on publicly available information. (Proposal at 18). This information is incomplete and often inaccurate. On occasion where the information is accurate, the application of the information is unreasonable or simply wrong. Specific examples are discussed below.
7. The Trustees have used a mass-loading approach to allocate liability for PAHs and PCBs. (Proposal at 18). This has resulted in the smaller potential sources receiving an unreasonably large share of liability relative to the larger sources. Specific examples are set forth below.
8. The settlement proposal assigns each party a share of DSAYs rather than dollars. (Proposal at 19). This approach makes it very difficult for parties with the smallest shares of liability to resolve their obligations easily and with minimal transaction costs. The smaller PRPs want to "cash out" but under the Trustees' proposal, it is impossible to quantify the settlement offer. The smaller parties have neither the inclination nor the expertise to undertake mitigation projects; they simply want to pay cash and walk away. The Trustees' proposal does not offer any such relief.
9. The Trustees have provided the PRPs with a CD containing copies of the supporting documents. However, not all of the documents cited in the settlement report as a basis for assigning liability are included on the CD and therefore were not available for review. Specifically, Document No. 261 is repeatedly cited in Appendix H as the basis for allocating liability to parties but this document is neither described in the list of supporting documents nor is a copy of the actual document included on the CD. See Appendix H "Hylebos Waterway NRDA Allocation References," page 13 of 17.

B. Specific Comments.

1. The municipal roadways and runoff associated with motor vehicle operation were not included as sites for purposes of the study. (Appendix H at 10). As demonstrated at other waterways in Commencement Bay, stormwater runoff from roads and urban/residential property has been found to be a significant source of PAHs, BEP, and other substances of concern. City storm drains discharge directly to the Hylebos Waterway at multiple locations, including one storm drain (Lincoln Avenue) immediately adjacent to the Modutech Marine site. The Trustees' decision to apparently exclude these obvious pathways has resulted in the City of Tacoma receiving a lesser share of PAHs than Modutech Marine and other small businesses. This is an unreasonable result. The City

storm drains discharge PAHs and other SOC's to the Hylebos Waterway every time it rains. The City of Tacoma's allocable share of PAHs should be significantly increased and the shares of Modutech Marine and other small businesses should be reduced.

2. The Trustees have allocated to the Modutech Marine site (parcel No. 24) the same share of PCBs (7.192 DSAYs) as the adjacent Don Oline auto fluff site (parcel No. 23). Auto shredder residue (ASR) is alleged to be the source of the PCBs. Modutech Marine contends that any ASR was placed on its site as fill by *prior owners and operators, not by Modutech Marine*. Consequently, in the final party-specific allocation Modutech Marine should not be attributed any share of responsibility for PCB releases. Also, the amount of ASR placed on parcel No. 23 was far greater than that which was placed on the Modutech Marine site, and therefore the two sites should not receive equal shares of responsibility for PCB releases. (See Document No. 92 for a description of the extensive deposits of ASR found at parcel No. 23; compare to Document Nos. 95 and 279).
3. The Trustees have allocated to the Modutech Marine site a larger share of PAHs than other boat builder/repair facilities. For example, Jones-Goodell received a PAH share of 4.623 DSAYs, but the Modutech Marine site received a PAH share of 5.095. The supporting documents indicate that PAHs were present in upland soil as well as marine railway sediment at both facilities, and the facilities have operated about the same length of time. There is no factual basis for assigning Modutech Marine a higher share of PAHs.
4. The Trustees have identified an above ground waste oil tank as being associated with Modutech Marine's activities at 2218 Marine View Drive. (Appendix H, Site Activity Report at 16; Document No. 274). The AST referenced in Document No. 274 is in fact located at 2215 Marine View Drive on property operated by Diesel Truck & Marine Service. Modutech Marine has no connection with 2215 Marine View Drive or the company that has operated there.
5. The Trustees have attributed BBPH, BEPH and DMPH to the Modutech Marine site. (Appendix H, Table 3-5; Site Activity Report at 16; Trigger Report at 8). Modutech recognizes that under the Trustees' current allocation proposal, the site rather than any specific company is alleged to be the source of these phthalates. Nevertheless, Modutech Marine must note for the record that these phthalates are most likely associated with the prior owner's site activities, i.e., the use of auto shredder residue as fill on the property. Support for this conclusion is found in the Trustees' attribution of BBPH, BEPH and DMPH to the Don Oline Auto Fluff site (parcel No. 23) and the General Metals site (parcel No. 16), both of which are associated with auto shredder residue. Also, there is no evidence of releases of phthalates from other boat builder/repair facilities such as Jones-Goodell or Nordlund Boat.

6. The Modutech Marine and Don Oline Auto Fluff sites have been assigned equal shares of responsibility for releases of copper (0.934 DSAYs), based on alleged contributions to copper footprint CU4. (Attachment 1; Appendix H, Table 3-5). As with PCBs and phthalates, it is obvious from the distribution map for copper that the source of copper for CU4 (and CU2) is the auto shredder residue associated with parcels 23 and 16. Within CU4, the highest concentrations of copper are immediately offshore of parcel 23 and lesser concentrations are adjacent to the Modutech Marine site. Accordingly, Modutech Marine should receive no more than one-third of the responsibility for CU4 and its share of DSAYs attributable to *copper releases should be reduced*.